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In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. [redacted] 20

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

FREDERICK S. KEPNER,
Respondent.

SUPPLEMENT TO BRIEF FOR THE RESPONDENT ON THE MERITS.

SAMUEL T. GAINES,
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Respondent.

SUPPLEMENT TO BRIEF FOR THE RESPONDENT ON THE MERITS.

SUMMARY OF SUPPLEMENT TO BRIEF.

I. Construction of Section 6, if resorted to, does not sustain petitioner's claims of congressional purpose and intent.

A. Revealing aids to construction:

1. Announced understanding of the bill by Senator Borah, submitting report from Committee on the Judiciary.
2. Understanding as revealed in House debate.
3. Language adopted goes far beyond what would have been necessary if sole purpose was that urged by petitioner.
4. Adoption of provision against removability emphasizes purpose to vest in employee absolute choice of forum within limitations specifically set forth.
5. Policy and purpose of Federal Employers' Liability Act supports respondent's position.
   a. Privileges and rights intended to be vested in employee and against employer.
   b. Uniformity of applicable law will not be served by adoption of petitioner's position.

6. Congressional record reveals no mention of the equity rule for which petitioner contends.

   a. In light of announced understanding of bill, by Senator Borah and in the House, and admitted appreciation by Congress of possible inconvenience and hardship to employer by exercise of rights literally construed, failure to refer to such equity rule does not indicate intention that it limit and abridge rights specifically set forth. (*Expressio unius est exclusio alterius.*)

APROPOS AIDS TO CONSTRUCTION OF SECTION 6.

The petitioner asserts that construction of Section 6 if resorted to, will reveal that the sole congressional purpose in the enactment of the venue and jurisdictional provisions thereof, was to abate the mischief of hardship to the employee. Where exercise by the employee of such provisions in their literal, plain meaning conflicts with the equity rule contended for by the petitioner, it asserts that Congress intended the literal meaning of the federal statute to yield and become subordinate to the equity rule, which in the instant case it asks a state court to apply. It is the respondent's position, that the language used by the Congress is unambiguous, clear, plain and express; that the literal meaning thereof is persuasive of its purpose; that such meaning leads to no absurd or futile result nor "an unreasonable one plainly at variance with the policy of the legislation as a whole" and hence there exists no reasonable necessity for construction.

Available aids to construction, if resorted to, however, we submit, demonstrate clearly that the petitioner's claims are untenable. The Federal Employers' Liability Act was enacted in 1908. It began immediately to run the gamut of the trials and tribulations of judicial appraisal and practical operation and by 1910 the Congress was confronted with several matters revealed thereby as warrant-

ing its attention. Thus the report of the Senate Committee on the Judiciary to accompany H. R. 17263, 61st Congress, 2d Session, reads:

> "The proposed amendments to the employers liability bill may be considered under three heads: First, as to the venue of such an action; Second, as to the concurrent jurisdiction of the courts of the several States; and Third, as to the survival of the right of action."

Section 51, Jud. Code requiring suit based on a law of the United States to be instituted in the district of which the defendant was an inhabitant had been held applicable to an action under the Act. Language in the Senate Committee Report, *supra*, referred to this requirement of filing suit under the Act in a district which "may be at a place in a distant State far from the home of the plaintiff and may be a thousand miles or more from the place where the injury was occasioned" as "a grave injustice to the plaintiff" which, "ought not to be permitted to exist." Upon such language as this the petitioner in great measure relies to sustain its claim that the sole purpose of the congressional enactment was to abate the mischief of hardship to the employee. But the petitioner overlooks many aids to construction which reveal the real purpose of the Congress.

Senator Borah in submitting the report of the Committee on the Judiciary, *supra*, stated, in language unmistakably clear and lucid, the purpose of the amendment. He said:

> "*The bill enables the plaintiff to find the corporation at any point or place or State where it is actually carrying on business, and there lodge his action, if he chooses to do so.*" (Italics ours) Congressional Record Volume 45, Part 4, page 4034.

To be sure Congress intended to abate the mischief which beset the employee but such abatement flowed natu-

rally from the larger purpose to vest in the employee, within the orbit specifically set forth, a right to determine the forum where his action was to be tried. The eyes of Congress had been opened to the necessity for venue and jurisdictional provisions in harmony with the policy of the Act. The result was a statute, the purpose of which was to vest in the employee the right to lodge his action "if he chooses to do so" in a federal court "where it (the employer) is actually carrying on business." Possessed of such right of choice, hardship to the employee automatically vanishes.

The proposed amendment as first passed by the House provided that:

> "Under this act an action may be brought in a circuit court of the United States, in the district of the residence of either plaintiff or the defendant, or in which the cause of action arose, or in which the defendant shall be found at the time of the commencement of such action."

The Senate Committee recommended that the words "either the plaintiff or" be stricken and that in lieu of the word "found" the phrase "doing business" be inserted. These amendments were approved by the Senate and the House. When the bill went back to the House the following was said apropos thereof, Congressional Record, Vol. 45, Part 4, page 4158:

> Mr. Parker—"The House bill provided that a suit might be brought either in the Court having jurisdiction at the residence of the Plaintiff or at the residence of the defendant or where the cause of action arose, or where the defendant was found. The Senate preferred not to have the suit brought where the plaintiff resided and thought that he ought to bring the suit where the defendant resided or where the cause of action arose, or where the defendant was not merely found but doing business."
>
> Mr. Mann—"And the bill now provides that suit may be brought against the defendant wherever the defendant is doing business."

Mr. Parker—"Yes—instead of where it is found."

Mr. Garrett—"Now are all laws and parts of laws in conflict with the act repealed?"

Mr. Clayton—"Why they would be repealed—"

Mr. Garrett—"By implication."

If the congressional purpose was solely to prevent the hardship of suit in a district far "from the home of the plaintiff" or from the "place where the injury was occasioned" (the mischief stressed by the petitioner), such hardship could have been abated by a provision permitting suit where the cause of action arose or where the plaintiff resided, if proper service could there be had on the defendant or if the defendant was doing business there. In such case then there would be no reason to include the clause "or (the district) in which the defendant is doing business at the time of commencing such action." The Congress was well aware that railroad companies operated over long distances and at places far distant from one another. The language chosen expresses clearly the intent of the bill as Senator Borah stated that he understood it and as the Congress, too, we submit, understood it for no voice was raised to object to Senator Borah's clearly enunciated understanding of the bill. The purpose to give to the employee a choice of forum is manifest.

The purpose is further emphasized by the adoption of the provision against removability. During the debate on the bill, Senator Paynter (Kentucky), said, Cong. Record, Volume 45, Part 4, page 4051:

> "I offer an amendment which will give to the plaintiff the right to select the forum in which his case shall be tried. He can select the federal or the state court, as he may prefer, to try his case arising under the Act in question."

And to further emphasize this right of choice in the employee the provision against removability was adopted. If the employee chose a state court, this exercise of his

right of choice was not to be disturbed even by a federal statute. It is the right of choice in the employee which is thus the core of the congressional purpose.

Witness also the policy and purpose of the entire Federal Employers' Liability Act. There is indicated a continuous effort to vest greater and greater privileges and rights in the employee. The abandonment of the fellow servant rule, the modification of the defense of contributory negligence, the denial of the defense of assumption of risk, first in safety appliance cases and now in all cases, the repeated enlargement of the statute of limitations all point in this direction. A necessary implication of the adoption of the petitioner's claim would be to wrest from the employee the right of choice of forum and to give it in effect to the employer who could thus frequently prevent the employee from trying his action in a jurisdiction distasteful to it.

Uniformity of controlling law was one of the prime purposes of the Federal Employers' Liability Act. (See *N. Y. C. v. Winfield*, 244 U. S. 147.) The adoption of petitioner's view, we submit, will not lead to uniformity. Each court of equity appealed to would have the power to determine in each instance what amounts to an inequitable exercise of his rights by the employee. The purpose of uniformity in such event will not be served. The right to enjoin, if permitted, would be resorted to frequently. Witness the case of *B. & M. R. R. Co. v. Whitehead*, cited by petitioner in its brief page 11, where suit was instituted to prevent an action brought in a place within 100 miles from where the cause of action arose. Even if a court of equity were to deny applications in such instances, delay and expense would be the inevitable lot of the employee.

What has been pointed out above, we submit, establishes clearly the congressional purpose to vest in the employee a right of choice of forum which can have substance only if it be a right unfettered by any such equity rule as petitioner advances.

What has been said, we submit, also disposes of the petitioner's argument that the congressional intent was to give the employee "no greater right than the ordinary litigant." (Petitioner's Brief, p. 21.) The employee under the Act, it is clear, enjoys many rights and privileges which do not apply to ordinary litigants and the right of choice of a federal district, as specifically set forth in the Act, is clearly one of these rights.

The petitioner asserts that the Congress realized and appreciated that the broad venue provisions might result in an exercise thereof by the employee which would be a hardship and inconvenience to the employer and it argues that failure to deny specifically the applicability of the equity rule, implies an intent to limit by such rule, the enjoyment of the specific rights granted to the employee.

Nowhere in the Congressional debates apropos the amendment in question, is there any reference to this equity rule. In the House, one of the members, Congressman Garret, inquired as pointed out above:

> "Now are all laws and parts of laws in conflict with the act repealed?"

This indicates clearly an intent that conflicting laws be repealed by the new amendment. Certainly it will not be denied that conflict exists between the respondent's right of choice in accordance with the literal meaning of the language used and the equity rule by means of which the petitioner seeks to prevent him from doing that which the federal statute permits.

If Congress intended to permit a court of equity to limit and abridge this substantive right of choice of forum which it so clearly vested in the employee, it would have been an easy thing for it to have said so and if any member of Congress had any such intention, it is reasonable to believe that he would have given voice to it especially in the light of what actually was said and the possible inconvenience and hardship to the employer which was under-

stood. The maxim "*expressio unius est exclusio alterius*," would here seem to be applicable.

Construction, if resorted to despite the plain, clear and unambiguous language of the statute, we submit, confirms a congressional purpose and intent accurately expressed in the literal, plain meaning of the language used.

What the petitioner actually contends for is a doctrine of equitable construction, apropos which it is said in 25 *R. C. L.* page 1023.

> "But the proposition, however it may once have been held or considered that the courts upon what is termed an equitable construction or otherwise, may, against the plain language of a statute, in opposition to the intent clearly expressed by the words, mitigate the 'violence of the letter' by introducing exceptions where the statute itself contains none, so as to relieve in cases of hardship or particular inconvenience has been too long and too frequently rejected to be now the subject of serious argument or doubt. Such doctrine, if it ever existed, was long since exploded."

The respondent seeking to exercise the substantive right of choice of a federal court, so clearly expressed by *Senator Borah*, *supra*, we submit, ought not to be enjoined from such exercise by a state court because the district which he chooses in accordance with the paramount, federal congressional enactment happens to be inconvenient or distasteful, for one reason or another, to the employer.

Respectfully submitted,

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